

**Office of
The City Attorney
City of San Diego**

**MEMORANDUM
MS 59**

(619) 236-6220

DATE: March 7, 2019
TO: Honorable Mayor and Councilmembers
FROM: Sanna Singer, Assistant City Attorney 
SUBJECT: Follow-up re: Councilmember Participation in SDSU West Negotiations

This follows our memorandum of January 7, 2019, concerning Councilmember participation in SDSU West negotiations (Negotiations). See City Att’y MS-2019-1 (Jan. 7, 2019), attached. In recent days, Councilmembers have asked about the Mayor’s ability to keep them informed regarding Negotiations. To summarize what we stated in our January 7 memo:

- Our Charter sets out the roles for the branches of our government;
- It is the Mayor’s role to negotiate real estate transactions and present them to the Council;
- It is the Councilmembers’ role to approve (or not approve) the real estate transaction, creating a “check and balance”;
- While it is not appropriate for Councilmembers to be on the negotiating team because they will ultimately approve or not approve the transaction, nothing prohibits the Mayor from providing the Council with informational updates either individually or in Open Session, as may be appropriate; and
- Closed Session discussions may also be appropriate and permissible so long as the discussion falls within the Brown Act exception for real estate transactions, which is limited to providing direction regarding price and terms of payment. While the Brown Act does not permit general status updates in Closed Session, they can be provided in Open Session.

Our January 7 memo provided options for keeping Councilmembers informed by way of example only. There may be other methods for doing so. For instance, while the Independent Budget Analyst, as the Council’s proxy, cannot participate in negotiations directly, the Mayor’s staff can also brief her on Negotiations.¹ We are available to provide additional guidance as needed.

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¹ The City Attorney has regularly briefed the IBA on the status of Negotiations since January 25, 2019.

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

MS 59

(619) 533-5800

DATE: January 7, 2019

TO: Honorable Mayor Kevin L. Faulconer

FROM: City Attorney

SUBJECT: Councilmember Participation in SDSU West Negotiations

INTRODUCTION

Local voters approved Measure G – the SDSU West citizens’ initiative – in the citywide election on November 6, 2018. Measure G contemplates that the City of San Diego and San Diego State University (SDSU) will negotiate the terms of a purchase and sale agreement, and potentially other agreements, related to the City’s sale of the Mission Valley stadium site, consisting of approximately 132 acres of real property (Site), to SDSU or its affiliate. Measure G allows the City to sell the Site only if the San Diego City Council approves the City’s sale of the Site “at such price and upon such terms as the Council shall deem to be fair and equitable and in the public interest.” San Diego Municipal Code (Municipal Code or SDMC) § 22.0908(a).¹

The City and SDSU are commencing negotiations related to implementation of Measure G. Your office has asked whether a Councilmember may participate in those negotiations as part of the City’s negotiating team. As discussed below, a Councilmember’s participation in contract negotiations violates the San Diego Charter (Charter). Individual Councilmembers and Council District staff may not participate in the City’s negotiations with SDSU to sell the Site. Rather, and in accordance with Measure G, the Council will serve as the “check and balance” by reviewing the proposed sale terms before deciding whether to approve the sale of the Site.

DISCUSSION

City officers and employees must comply with the Charter, which is the City’s constitution. See *Miller v. City of Sacramento*, 66 Cal. App. 3d 863, 867 (1977). “A city charter is like a state constitution but on a local level; it is a limitation of, not a grant of power.” *Id.* “Any act that is violative of or not in compliance with the charter is void.” *Domar Electric, Inc. v. City of Los Angeles*, 9 Cal. 4th 161, 171 (1994) (city council cannot act in violation of its city charter).

¹ The main substance of Measure G’s provisions will be codified in Municipal Code section 22.0908.

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Under the Charter, the Council is the City's legislative body, responsible for making public policy decisions, and the Mayor is the City's chief executive officer and chief budget and administrative officer. *See* Charter §§ 11, 11.1, 11.2, 12, 28, 260, 265. The Charter establishes a separation of authority between the Council (legislative authority) and the Mayor (executive and administrative authority), including a system of checks and balances, similar to the separation of powers among the three branches of government under the state and federal constitutions. City Att'y MOL No. 2015-13 (Aug. 24, 2015); 2007 Op. City Att'y 347 (2007-1; Apr. 6, 2007). "The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch." *Carmel Valley Fire Prot. Dist. v. State of Cal.*, 25 Cal. 4th 287, 297 (2001) (citations omitted). The separation of powers doctrine is intended to prevent the basic or fundamental powers of the government from being combined in the hands of a single person or a group. *Id.*

The Charter dictates that the Mayor will supervise administration of the City's affairs and make recommendations to the Council regarding the City's affairs. *See* Charter §§ 28, 260, 265(b)(3). "The Mayor holds all of the City's administrative power, and is solely responsible for the day-to-day operations of the City." 2010 City Att'y Report 808 (2010-30; July 26, 2010). Accordingly, the Mayor's office, or a City department acting under the Mayor's direction, conducts the City's contract negotiations, including real property negotiations.

A Councilmember's participation in contract negotiations would intrude upon the Mayor's exclusive authority under the Charter to conduct the City's administrative affairs and would violate the Charter's mandate for a separation of authority between the legislative and executive branches of City government.² If a City department presents a negotiated contract for the Council's approval, and if an individual Councilmember disfavors the negotiated terms, the Councilmember may exercise his or her legislative prerogative by voting to deny the contract or requesting that the Mayor renegotiate contract terms. A Councilmember's legislative function under the Charter does not extend to negotiating contract terms directly with a third party at the outset. Moreover, we believe a Councilmember's direct involvement in contract negotiations, followed by that same Councilmember's vote on the negotiated contract, would undermine the Charter's system of checks and balances for City government.

The Mayor may keep the Council apprised of ongoing contract negotiations without implicating a Charter violation. The Council may ask the Mayor to provide informational updates regarding negotiations, and the Mayor "shall inform the Council of any material facts or significant developments related to all matters under the jurisdiction of the Council." Charter § 32.1. Also, the Council may provide limited direction on real property negotiations through Closed Session discussions. The Ralph M. Brown Act (Brown Act) permits the Council to hold a Closed Session

² We are informed that Measure G proponents have interpreted Measure G to require the involvement of one or more Councilmembers in negotiations for sale of the Site. As mentioned above, Measure G requires that, before the City's sale of the Site can occur, the Council must approve the sale terms. SDMC § 22.0908(a). However, nothing in Measure G requires, or even envisions, that a Councilmember will participate in Site-related negotiations. Indeed, consistent with the Mayor's role under the Charter, Measure G states: "Nothing in this section abrogates, or is intended to abrogate, the Mayor's administrative and executive authority, particularly with regard to engaging in good faith contract negotiations, including purchase and sales agreements for the City." *Id.* § 22.0908(z).

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with its real property negotiators, before the City's sale of the Site, to allow the Council to grant authority to its negotiators regarding the "price and terms of payment" for the sale transaction.³ See Cal. Gov. Code § 54956.8. However, the "price and terms of payment" clause is narrowly construed and, in the current context, would encompass only the amount of consideration to be paid for the Site, the form, manner, and timing of how that consideration would be paid (e.g., lump sum payment, installment payments, or other payment arrangement), and items that are essential to arriving at the price and payment terms, such as methods of valuation for the Site. See *Shapiro v. San Diego City Council*, 96 Cal. App. 4th 904, 924 (2002) (Council's closed session discussion exceeded scope of Brown Act exception for real property negotiations, in part because discussion extended far beyond specific buying and selling decision); 94 Op. Cal. Att'y Gen. 82 (2011). The "price and terms of payment" clause would not encompass non-price terms of the sale transaction that will need to be negotiated in accordance with Measure G.

CONCLUSION

The Charter, which serves as the City's constitution, clearly delineates between the Council's legislative authority and the Mayor's executive and administrative authority. In light of this separation of authority, it is improper for an individual Councilmember – or the Council as a whole – to become involved in the City's administrative affairs, including contract negotiations, although the Mayor may keep the Council apprised of such negotiations.

MARA W. ELLIOTT, CITY ATTORNEY

By Kevin Reisch
Kevin Reisch
Senior Chief Deputy City Attorney

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MS-2019-1

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cc: Honorable City Councilmembers
Kris Michell, Chief Operating Officer
Aimee Faucett, Chief of Staff, Office of the Mayor
Andrea Teylin, Independent Budget Analyst

³ Any future Closed Session discussions regarding the City's sale of the Site would be strictly confidential. Any breaches of confidentiality could not only jeopardize the City's negotiating position, but also result in criminal charges and other serious consequences.

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